95-1728

Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JANETTE LOHMAN, THE MISSOURI DEPARTMENT OF REVENUE AND THE STATE OF MISSOURI,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does federal sovereign tax immunity supplant Missouri's sovereign right to raise revenue by imposing a sales tax on the transfer of electricity to a federal contractor that orders, uses, is billed for, and, with its own funds, pays for the electricity?

2. Does the legal incidence of a state sales tax fall on a purchaser claiming federal sovereign tax immunity when the state's taxing statute does not require a purchaser to pay the tax?

LIST OF PARTIES

The defendants-appellants to the proceedings below were the petitioners State of Missouri, the Missouri Department of Revenue, and the Director of the Missouri Department of Revenue. The office of director is now held by Janette Lohman, and she has been listed as a petitioner. Rule 35.3. The United States of America was the plaintiff-appellee below and is the respondent herein. Kansas City Power and Light Company was named as a defendant before the district court, but did not participate in the appeal of this matter.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Janette Lohman, the Director of the Missouri Department of Revenue; the Missouri Department of Revenue; and the State of Missouri respectfully pray that the Court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit in *United States of America v. Janette Lohman, Director of Revenue, State of Missouri; Missouri Department of Revenue; and State of Missouri*, No. 93-3303 (January 22, 1996).

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 74 F.3d 863 and reprinted in the Appendix ("App.") at A-1. The final order of the district court granting the injunctive relief requested by the United States is unreported and reprinted in the Appendix at A-14. The district court's order on the summary judgment motions is unreported and reprinted in the Appendix at A-19.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331, 1345 and 2201, the respondent brought this suit in the United States District Court for the Western District of Missouri. On September 8, 1992, the district court granted respondent's motion for summary judgment, App. at A-19, and entered a judgment. App. at A-17. Missouri's appeal from the 1992 order was dismissed on the agreed motion of the parties for want of finality and the case was remanded for further proceedings. App. at A-16. The district court

entered final injunctive relief on July 12, 1993. App. at A-14.

On January 22, 1996, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court on alternative grounds. App. at A-1.

The jurisdiction of this court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the supremacy clause of the Constitution of the United States and parts of Chapter 144 of the Revised Statutes of Missouri. Those provisions are reprinted in the appendix beginning at A-25.

STATEMENT

This case concerns two rights of the fifty states: the right to tax sales to federal contractors that order, pay for, and use commodities to fulfill their federal contractual obligations; and the right to conclusively determine the legal incidence of their revenue laws when the states' constructions are reasonable. In its landmark opinion in *U.S. v. New Mexico*, 455 U.S. 720 (1982), this Court clarified and re-enshrined the right of the states to tax sales to federal contractors. Even earlier this Court determined that states were empowered to conclusively determine the legal incidence of state revenue laws when the states' interpretations are consistent with a reasonable statutory construction. *American Oil Co. v. Neill*, 380 U.S. 451 (1965). In this case the court of appeals radically departed from this Court's instructions on these important matters

and wounded the heart of the states' retained sovereign power.

The district court enjoined Missouri's taxation of electricity sold by Kansas City Power and Light Company ("KCPL"). The electricity is ordered, paid for, and used by Olin Corporation ("Olin") in its operation of the Lake City Army Ammunition Plant (the "Plant"). Olin operates the federally-owned Plant pursuant to a management and operation contract ("M & O Contract"), using the electricity to produce ammunition for delivery to the federal government and for sale to other entities. The district court found, at the federal government's behest, that Olin purchased the electricity and resold it to the federal government, thereby excluding such sales from tax pursuant to Missouri law. App. at A-23. The district court relied on the now discredited case of *U.S. v. Benton*, 772 F. Supp. 453 (W.D. Mo. 1990), *aff'd*. 975 F.2d 511 (8th Cir. 1992), *cert. granted and opinion vacated sub nom. U.S. v. Melcher*, 508 U.S. 957 (1993), and *rev'd sub nom. U.S. v. Lohman*, 21 F.3d 844 (8th Cir. 1994). App. at A-23.

The Eighth Circuit disagreed with the district court's conclusion that Olin purchased the electricity. Rather, the court of appeals found that the federal government was the purchaser of the electricity and then affirmed, holding that the legal incidence of Missouri's sales tax was laid on the purchaser of electricity. App. at A-13.

A. Army's Relationship with KCPL and Remington

The Plant, a federally-owned facility located in Independence, Missouri, which has been in operation since 1941. It is used principally to manufacture ammunition for small arms. On April 1, 1951, KCPL entered into a

Negotiated Electrical Services Contract ("Contract") with the United States Department of the Army. Under the Contract KCPL contracted to sell and deliver, and the Army agreed to purchase and receive, electrical power for the purpose of operating the Plant.

In July 1960, the federal government issued a letter to Remington Arms Company ("Remington"), the then-operator of the Plant, referencing the "Procedure Covering *Purchases* by CPFF Contractors [Plant operators] Under Indefinite Delivery Type Contracts Negotiated by Governmental Agencies." Emphasis added. The federal government advised Remington that a method of "direct ordering and direct payment" by Remington for commodities, including electricity, would alleviate problems for the federal government.

This new procedure was applicable to other contract operators of government-owned facilities across the nation. Operators at various government installations, including the Plant, would order and directly pay for electrical services. The objective of the procedure was the elimination of any need for the federal government to issue purchase orders and "pay the [electrical services] vendor by U.S. Treasury check." The government recognized that the revised purchasing procedure would lead to additional state taxation:

> In certain instances it is possible that the Government will suffer tax disadvantages as a result of this revised procedure. The procedure has been adopted with due advertence to this fact on the basis that the overall savings possible thereby will more than offset any possible cost increases resulting from taxes.

On August 10, 1960, Remington issued its own purchase order (not an Army purchase order) for electricity, which KCPL accepted. Thereafter, Remington ordered, used and paid for the electricity delivered to the Plant. Additionally, Remington claimed a sales tax exemption for the electricity delivered to the Plant. The exemption letter, sent to KCPL, discusses "purchases" made by Remington.

In April 1962, the federal government and KCPL formalized the arrangement established by the government's previously-issued procedure and modified the Contract. According to this modification, the parties agreed that so long as the Plant was managed by an operator, the operator could purchase electricity "to the same extent" that the federal government had done so. The modification provided:

> orders for services under this contract may be placed with [KCPL] by such [operator] and will be honored to the same extent as will orders placed by the Government . . . . Furthermore, during such period of time [KCPL] agrees that placing of such orders, and payment thereof by such [operator], will satisfy the requirements of this contract concerning minimum monthly accounts to be ordered and paid for by the Government.

Since April 3, 1962, the checks, drafts or money orders used to pay for electricity delivered to the Plant have been issued or drawn on the accounts of Remington or Olin, the Plant's operators.

Under the Contract, the federal government agreed that electrical service furnished would be subject to regulation by the state regulatory commission. The

government agreed to pay those rates established by the commission. The bills submitted for electricity delivered to the Plant are submitted under Rate Schedule PL, which is approved by the Missouri Public Service Commission. Following the decision of the United States to have the operators of the Plant order and pay for electricity, Rate Schedule PL was modified to provide: "Tax Schedule TA shall be applicable to all customer billings under this schedule." Tax Schedule TA, not surprisingly, provides for tax collection:

> There shall be added to the monthly bill of a customer, as separate items, a surcharge equal to the proportionate part of any license, occupation, or other similar fee or tax applicable to electric service by the Company [KCPL] to the customer, which fee or tax is imposed upon the Company by taxing authorities on the basis of the gross receipts, net receipts, or revenues from electrical sales by the Company.

Pursuant to this Schedule, Olin has paid local gross receipts taxes imposed on the electricity delivered to the Plant and the federal government has reimbursed Olin for those tax payments.

B. Olin's Relationship with the Army and KCPL

Olin succeeded Remington as the operator of the Plant. On July 2, 1985, Olin entered into the M&O Contract with the Department of the Army to operate and maintain the Plant. This contract required Olin to become fully responsible for the operation and maintenance of the Plant. The M&O Contract provided that Olin, as an

independent contractor and not as a government agent, would furnish all the equipment, supplies and material necessary to operate the Plant except those "furnished by the Government." Olin, and Remington before it, requested reimbursement for payments made to KCPL for electrical services on a form labeled "Public Voucher for Purchases and Services Other than Personnel." The contract operators of the Plant have been reimbursed in full by the federal government for all amounts they have paid to KCPL for electrical services. The federal government does not reimburse Olin for its acquisition of government-furnished material. Hence, the electricity is, by definition, not government-furnished material.

Neither the district court nor the court of appeals found that Olin was anything other than what it claims to be: an independent contractor. It is not the government's purchasing agent, nor one of its constituent parts. Olin is a private, for profit, business corporation. Olin is neither a federal instrumentality nor the federal government's disbursing officer. Olin is contractually obligated to pay KCPL's bills for electrical service, and KCPL has made a demand on Olin for sales taxes due. Neither Remington nor Olin exercised dominion over federal funds when they issued checks to KCPL for electrical services, and the federal government is not a signatory on the accounts used by the contract operators to pay KCPL for electrical services. The monies delivered by the Plant's contract operators were private corporate funds, not federal government funds. The federal government has no ownership interest in Olin, and the congruence of professional interest between the two is not complete. The federal contractors were not required to secure the federal government's specific approval for their payments of electrical services.

Furthermore on May 8, 1986, Olin issued a purchase order for electricity to be delivered to the Plant. The M&O Contract does not require the contract operator of the Plant to issue a purchase order for electricity. As a result of Olin's purchase order, KCPL's invoices were subsequently directed to "Olin Corp." as the "Customer" and reference the M&O Contract number and Olin's purchase order number, not the number of the federal government's contract with KCPL. The purchase order indicates that the buyer *or* the U.S. government can terminate the purchase order upon thirty-day written notice. The word "buyer" in Olin's purchase order refers to Olin. Olin assigned a rating on the purchase order it sent to KCPL. This rating, DO-C-3, is to be used by operators such as Olin "for the *purchase* of maintenance, repair, and operating supplies and installation material for production equipment." Emphasis added. The M&O Contract requires the government to reimburse Olin for moneys paid in state taxes unless an exemption is available to Olin.

C. Olin's Use of Electricity

The electricity delivered to the Plant is used in the manufacture of small-arms ammunitions, for related support and administrative functions, and by Plant housing. These physical activities, which use and consume the electricity at the Plant, are performed by Olin. Olin orders the electricity delivered to the Plant; even if Olin's purchase order were ignored, the order occurs and delivery is accomplished when Olin flips the switch completing the circuit using electrical power. The electricity is used instantly when it is delivered.

Olin controls the Plant equipment and facilities that consume electricity, turning on and off the electricity on a day-to-day basis. In doing so Olin not only orders and uses

the electricity, it also fulfills its obligation under the M&O Contract to economically manage its use. To maximize energy conservation and minimize energy consumption, Olin has reduced lighting levels and taken other steps that do not require the federal government's approval. Olin has created an energy awareness program to encourage the conservation of energy and created energy conservation teams to coordinate energy conservation efforts. No government employees are on these conservation teams.

Olin has two important interests in reducing peak demand charges for electricity: cost reduction and energy conservation. Olin has been successful in its conservation activities at the Plant and has received federal energy awards. For the purpose of determining any award fee under the M&O Contract, Olin is evaluated on energy consumption and energy conservation.

D. The Audit

In connection with a 1986-1988 audit of KCPL, the Department of Revenue assessed KCPL $737,893.68, which KCPL paid under protest. Of this assessment, $561,413.07 represented sales tax, interest, and penalties on sales from January 1986 - December 1988 of electrical power by KCPL delivered to Olin for use at the Plant.[1]

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[1] During the audit, the Department of Revenue discovered that the federal government had submitted tax exemption certificates (issued to the Army by the Missouri Department of Revenue) to KCPL. These exemption certificates, covering electricity delivered to the Plant, provide that exempt purchases must be paid for by check or draft drawn on funds of the Department of the Army and that the exemption was not assignable or transferable. But the monies to pay for electricity delivered to the Plant were funds belonging to Olin. The federal government has not denied this misuse of the exemption certificates issued by Missouri.

Petitioners now seek review of the appellate court's decision prohibiting Missouri from taxing KCPL's sales to Olin, the federal contractor who ordered, used, and paid for the electricity. Petitioners also seek review of the appellate court's decision that the legal incidence of Missouri's tax is on the purchaser because Missouri's taxing statute permits the seller to absorb the tax as a cost of doing business.

REASONS FOR GRANTING THE WRIT

Before the Court is a case of extraordinary importance to the fifty states. It directly and negatively impacts their sovereign right to raise revenues and, thus, interferes with their ability to provide an effective balance to the exercise of federal power. This is the second in a series of cases to reach this Court in which the federal government has attempted to interfere with Missouri's power to raise revenue.[2] The Eighth Circuit decided that federal sovereign tax immunity prevented Missouri from imposing a sales tax on the seller of electricity that is delivered to a federal contractor even though that contractor ordered, used, and, with its own funds, paid for the electricity. Additionally, the Eighth Circuit labeled "unreasonable" the decisions of the Missouri Supreme Court construing the statute as one placing the legal incidence of the tax on the seller, despite the consistency of Missouri's construction with this Court's rulings on the issue. These conclusions conflict with the prior decisions of this Court and will confuse other circuit courts in applying the Court's precedents. Furthermore, the questions presented in this petition raise significant questions going to the core of

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[2] *U.S. v. Benton*, 772 F. Supp. 453 (W.D. Mo. 1990), *aff'd*, 975 F.2d 511 (8th Cir. 1992), *cert. granted and opinion vacated sub nom. U.S. v. Melcher*, 508 U.S. 957 (1993) and *rev'd sub nom. U.S. v. Lohman*, 21 F.3d 844 (8th Cir. 1994).

federal/state relations. Only this Court can now restore the necessary and constitutionally-enshrined balance of power between the sovereign parties to this case.

I. The Eighth Circuit's holding, that federal sovereign tax immunity entirely supplants the states' sovereign right to raise revenue by imposing a sales tax on the transfer of electricity to a federal contractor which orders, uses, and, with its own funds, pays for the electricity, significantly disrupts the balance this Court has established between the interests of the states and those of the federal government.

There is but "one constant" in the field of federal sovereign tax immunity: "a State may not, consistent with the Supremacy Clause. . . , lay a tax 'directly upon the United States.'" *U.S. v. New Mexico*, 455 U.S. 720, 733 (1982), *quoting Mayo v. U.S.*, 319 U.S. 441, 447 (1943). The Eighth Circuit has interpreted that "constant" so broadly that it obliterates another principle established in *New Mexico*: the need to preserve our federal system's "competing constitutional imperatives, by giving full range to each sovereign's taxing authority." *New Mexico*, 455 U.S. at 735-36. This Court should review this case to eliminate the considerable confusion caused by the Eighth Circuit's reluctance to apply this Court's precedents and the Eighth Circuit's implicit endorsement of the notion that the fifty states' taxing power is but a nuisance that is easily turned aside by the government's mere assertion of federal sovereign tax immunity on behalf of its contractors. Private operators of federal installations throughout the nation order, use, and pay for commodities. Pursuant to the Eighth Circuit's opinion, all may now claim the benefits of federal sovereign tax immunity if the federal government

ever had any involvement in selecting the seller of the commodity.

The inherent incongruity of allowing one sovereign to interfere with another's revenue collection has long been apparent to those sensitive to our nation's federal system. Alexander Hamilton commented favorably on the Constitution's intolerance for federal efforts to interfere with state revenue collection systems:

> [A]n attempt on the part of the national government to abridge them [the States] in the exercise of it [their independence and uncontrollable authority to raise their own revenues] would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

The Federalist No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Eighth Circuit's opinion evidences no concern for its "violent assumption of power," utterly fails to regard the fifty states' retained sovereign right to raise revenues and misses the entire tenor of current tax immunity law. This deficiency is apparent in the appellate opinion when it declares that *New Mexico* and *Alabama v. King & Boozer*, 314 U.S. 1 (1941) "do not require the denial of immunity here." App. at A-10.

Federal immunity from taxation is the exception, not the rule, when a state seeks to impose a sales tax on a private company. The rule articulated by this Court is that a state's power to tax can be denied only with "the clearest constitutional mandate." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 (1976). Until the Eighth Circuit ruled, there were two clear requirements antecedent to a finding of federal sovereign tax immunity: the federal government had

to be the purchaser of the property taxed, and the legal incidence of the state's tax had to fall on the purchaser. *New Mexico*, 455 U.S. at 742-43 and *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347 (1968). The Eighth Circuit has adopted a reading of those requirements that will, if left uncorrected, erode the power of the states to raise revenues and diminish their ability to act as an effective balance to federal power.

With due regard to the sovereign rights of both the federal government and the State of Missouri, the demands of dual sovereignty in our federal system require that a court first examine a state's taxing statute to determine what activity the state proposes to tax.[3] Upon each act of making a retail sale of tangible personal property within the state, Missouri imposes a tax of four percent of the purchase price or other consideration paid or charged. Mo. Rev. Stat. § 144.020.1(1) (1994).[4] A retail sale is defined by reference to a change in "ownership."

> Any transfer made by any person engaged in business . . . of the ownership of, or title to, tangible personal property to the purchaser for use or consumption and not for resale . . . for a valuable consideration.

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[3] This Court observed that it is the activity being taxed that drives tax immunity analysis. "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as *the activity being taxed* is concerned." *New Mexico*, 455 U.S. at 735 (emphasis added).

[4] All references to Missouri statutory materials will be to the 1994 statutes unless otherwise noted.

Mo. Rev. Stat. § 144.010.1(8) (Supp. 1995). Ownership includes the exercise of dominion or control over the property transferred. *State ex rel. Thompson-Sterns-Roger v. Schaffner*, 489 S.W.2d 207, 215 (Mo. 1973). Sales at retail specifically include "sales of electricity [or] electrical current . . . to domestic, commercial or industrial *consumers*." Mo. Rev. Stat. § 144.010.1(8)(b) (emphasis added). Furthermore, Mo. Rev. Stat. § 144.020.1(3) specifically imposes a sales tax on transfers of electricity or electrical current to commercial or industrial consumers.

Pursuant to this statutory scheme Missouri, like many other states, imposes its sales tax on the seller of property who transfers the control of that property to another for use or consumption for a valuable consideration. Under the facts of this case, Missouri does not impose a tax directly on the federal government. KCPL is the seller of the electricity and Olin accepts control of it, uses it, and pays KCPL for it.

To reach its veiled conclusion, that Missouri is attempting to "rummage through the federal pocketbook" (App. at A-13), the Eighth Circuit begins its discussion not with an examination of Missouri's tax law or its applicability to Olin's behavior, but with an analysis of the activities undertaken by the federal government. Contrary to the decision of the lower court, the court of appeals concludes that the federal government is the purchaser of the electricity delivered to the Plant because, when it long ago negotiated a requirements contract for the delivery of electricity to the Plant, it secured a rate and a vendor, and because it remains ultimately liable on the sale of

electricity.[5] However, none of these events constitute a taxable activity under the law of Missouri or most other states.

A brief examination of the contractual relationship between the parties is revealing. There is little remaining of the 1951 Contract. Originally the Contract provided that the federal government would "purchase and receive" the electricity. In 1962 the federal government and KCPL modified the Contract to reflect the government's earlier issued, nation-wide policy changing the identity of the party performing the acts of purchase. The modification obligates KCPL to sell electricity to private companies in lieu of sales to the federal government.

> Orders for service under this Contract may be placed with [KCPL] by the [operators of the Plant] and will be honored to the same extent as will orders placed by the Government . . . . Furthermore, . . . [KCPL] agrees that placing of such orders, and payment thereof by such [operators], will satisfy the requirements of the contract concerning minimum monthly amounts to be ordered and paid by the Government.

The federal government referred to the activities of the operators as "purchases" of electricity. Following the Contract modification the operators of the Plant, including Olin, performed the acts of purchase -- they ordered the electricity and they paid for it.

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[5] In reality there is no special rate. Rather, the federal government has agreed to pay whatever rate the Missouri Public Service Commission authorized KCPL to charge for large commercial users in KCPL's service area.

In an unprecedented departure from this Court's jurisprudence, the Eighth Circuit found these purchases made by a private contractor with its own funds cloaked with the federal government's tax immunity, despite the fact that the private contractor is "sufficiently distinct from" the federal government and is not the government's agent. *See New Mexico*, 455 U.S. at 743. The sales in *New Mexico* were subject to sales tax even though "only federal funds" were expended when the private contractors made the purchases. 455 U.S. at 726. Olin expended only private funds. Further, to be entitled to the government's tax immunity, a private contractor must actually stand in the federal government's shoes and have become so assimilated by the federal government as to have become one of its constituent parts. *Id.* at 736. Here the federal government has admitted that Olin did not meet this test.

Ignoring the considerations set forth by this Court in *New Mexico*, the Eighth Circuit has announced a new constitutional rule: that state taxes are impermissible if the federal government might ultimately be required to pay for a product purchased by a contractor. The Eighth Circuit's new rule allowed it to jump over the litany of factors that were critical under the *New Mexico* analysis; that Olin is a private, for-profit, business corporation and an independent contractor, not the government's purchasing agent, instrumentality, disbursing officer or one of its constituent parts. The Eighth Circuit instead found it important only that "the terms of the supplemental agreement do not unconditionally discharge the federal government from its obligations." App. at A-12. This result-driven rule is not found in this Court's jurisprudence nor is it supported by the purposes underlying federal sovereign tax immunity. Even in *New Mexico*, where the federal government was directly liable to the vendors, that fact did not persuade this Court to find immunity. Rather, as the operators were also

"presumably" liable to the vendors, this Court found immunity inappropriate. 455 U.S. at 743. The Eighth Circuit turns that holding on its head and only action by this Court can upright it.

The only other circuit to approach this issue had a significantly different understanding of the constitutional rule. The United States Court of Appeals for the District of Columbia Circuit spoke to the issue in *United States v. District of Columbia*. 669 F.2d 738 (D.C. Cir. 1981). There a federal employee selected and negotiated with a hotel to provide conference facilities for a federal conference and agreed to the dates and prices. This was similar to the effect of the federal government's contract with KCPL; it identified the vendor and established the pricing mechanism. Thereafter, in *District of Columbia*, the federal government hired a conference manager to organize the conference. This manager entered into an agreement with the hotel for the conference, similar to Olin's purchase order issued to KCPL. Just as Olin pays KCPL and is reimbursed, the manager paid the charges for the conference and was later reimbursed by the government.

The District of Columbia district court granted the federal government's motion for summary judgment, as did the Eighth Circuit here, finding that the contractor was the government's agent and that the city was attempting to lay an unconstitutional tax directly upon the United States. 669 F.2d at 741. Writing for the court of appeals, Judge Ginsburg reversed, noting that "[p]recedent securely indicates that any municipality other than the District of Columbia could tax sales of this sort." *Id.* at 739. After synthesizing this Court's cases, the District of Columbia Circuit found that a federal contractor "qualifies as a purchaser subject to sales tax exactions" with but one exception: if the contractor is *"explicitly designated by the*

federal contract as an agent with authority to pledge the credit of the United States." *Id.* at 744 (emphasis in original). *See also U.S. v. Forst*, 442 F. Supp. 920 (W.D. Va. 1977), *aff'd*, 569 F.2d 811 (4th Cir. 1978) (the court held material procured by a government contractor subject to sales tax, despite the high degree of control the government maintained over the procurement, because the "key factor" is whose credit is bound up in the transaction).

In Olin's case, as that of most federal contractors, the Contract does not "explicitly" or otherwise allow Olin to "pledge the credit of the United States" when it purchases commodities. In the District of Columbia Circuit, that would be dispositive. A contractor operating a federal facility in the District of Columbia under a contract like Olin's could be charged sales tax on the transfer of electricity. But in the Eighth Circuit, Olin and other federal contractors are excused from that obligation.

The holdings of the District of Columbia and Fourth Circuits had their origin in *Alabama v. King & Boozer*, 314 U.S. 1 (1941). There this Court defined a purchaser as "the person who orders and pays for [goods] when the sale is for cash or who is legally obligated to pay for them if the sale is on credit." 314 U.S. at 10. There is no material dispute in the case at bar that Olin ordered and paid for the electricity. The Eighth Circuit finds this fact irrelevant, labeling Olin as the government's "paymaster." App. at A-10. The significance of this labeling is not disclosed in the appellate court's opinion nor is it disclosed in this Court's prior decisions in this area. The court of appeals cannot have overlooked the federal government's numerous admissions in this case that Olin is a private, for profit business corporation, not the government's purchasing agent or disbursing officer, and not a federal instrumentality or a

constituent part of the federal government. Hence, Olin meets the test for a cash purchaser under *King & Boozer*.

Even if KCPL's sales of electricity were considered on credit, Olin would meet this Court's test for a credit purchaser. The *King & Boozer* court determined that sales were for credit when the contractors were obligated to pay for the material purchased despite the fact that the government reserved the right "to pay directly . . . all sums due from the Contractor." *Id.* The federal government did not even reserve that right here; it transferred the obligation to pay for electricity to the Plant's operator, Olin, and Olin issued a purchase order and paid for the electricity.[6] Pursuant thereto, KCPL billed Olin for the electricity, labeling Olin as the customer, and received payment from Olin. Surely if this case involves a credit sale, Olin's credit

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[6] The Eighth Circuit notes that the contractors in *New Mexico* and *King & Boozer*, "made purchases in their own names and had direct contractual liability to the vendors" (App. at A-10), and then concludes that Olin's purchase order does not perform this function. App. at A-4, A-10, nn.5, 6 and 9. The court concludes that Olin's purchase order is a mere procedural document, even though the contract documents make no mention of procedural purchase orders. App. at A-10. The court also says that the purchase order incorporates the 1951 Contract. App. at A-4. In reality Olin's purchase order specifically incorporates a contract bearing the date April 30, 1947. Confirming petitioners' assertion that this is a results-orientated decision, the court describes this as a typographical error (App. at A-4, n.5), despite evidence that the Army's contractual relationship with KCPL began in 1941 and the only witness to testify concerning a contract with the 1947 date professed an absence of knowledge on the subject. Missouri directed the district and circuit courts to these facts concerning the contested nature of the applicability of the 1951 Contract, but the court, affirming the entry of summary judgment, decided without discussion that this evidence was insufficient for a fact finder to conclude that Olin's purchase order worked a novation of an earlier contract.

stood behind the sale of the electricity just as the contractor's credit did in *King & Boozer*.

Thus, the Eighth Circuit's conclusion that the federal government is the purchaser of the electricity which Olin orders, uses and pays for is an unsupported and insupportable departure from this Court's precedents. The Eighth Circuit's conclusion appears to be premised on but one point; so long as the Contract between the federal government and KCPL remains in force, labeling the federal government the purchaser and establishing the pricing mechanism for the electricity delivered to the Plant, the government is the purchaser of the electricity regardless of the limited function the Contract performs. The resort to "wooden formalism" has been rejected by this Court, *New Mexico*, 455 U.S. at 737, and should have been rejected here. Missouri is constitutionally entitled to tax the seller of electricity delivered to a private corporation who orders, uses and pays for it.

The situation before the Court is similar to the study tours that are arranged by bar associations throughout the country. The bar associations contract with tour operators for the provision of a tour package available at a set price to members of the bar and their families. The tours are then ordered and paid for by the members of the bar. Under the Eighth Circuit's decision, if the bar association's and the tour operator's contract designates the bar association as the purchaser, that designation is inviolate. This is not an appropriate statement of the law.[7] It is the

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[7] "We can not believe that an immunity of constitutional stature rests on . . . [an] approach [that] allows any government functionary to draw the constitutional line by changing a few words in a contract." *New Mexico*, 455 U.S. at 737, *quoting Kern-Limerick Inc. v. Scurlock*, 347 U.S. 110, 126 (1954). Labeling is simply not dispositive in

bar member who orders and pays for the tour and is its purchaser. The bar association merely negotiated the contract which established the price for the purchases made by its members.

Similarly, the 1951 Contract now fulfills (if it has not been replaced with Olin's purchase order) only one function; it establishes the price, at the state-regulated rate, for the class of electricity which Olin purchases from the electrical utility in the area. The federal government's negotiation of a contract incorporating the state-approved rate for electrical service to be delivered to the Plant is simply insufficient to cloak Olin's order, use and payment for the electricity with federal sovereign tax immunity. Missouri does not tax what remains of the federal government's contractual relationship with KCPL. Rather, Missouri taxes, pursuant to its retained sovereign power, KCPL's transfer to Olin of electricity which Olin orders, uses and pays for.

The Eighth Circuit's decision is Alexander Hamilton's foretold event: a violent assumption of power on the part of the national government to abridge a state's exercise of its independence and authority to raise revenues, unwarranted by any article or clause of the Constitution.

II. The Eighth Circuit's opinion is an affront to state sovereignty because it determines that the legal incidence of a state's sales tax falls on a purchaser claiming federal sovereign tax immunity even though the state taxing statute does not require the purchaser to pay the sales tax.

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identifying the purchaser. The issue is who performs the act of purchase.

This Court stated the test to determine, for federal sovereign tax immunity purposes, on whom the legal incidence of a state sales tax falls in terms that seemed, until now, to be eminently clear and concrete: "a sales tax which by its terms *must* be passed on to the purchaser imposes the legal incidence of the tax on the purchaser." *First Agric. Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339, 347 (1968) (emphasis added). The Eighth Circuit has rejected this rule and substituted its own; deciding that the incidence of a state's sales tax falls on the purchaser even though the state's taxing statutes do not require that the tax be passed on to the purchaser.

There is no dispute that the Supremacy Clause, U.S. Const. Art. VI, cl. 2, prohibits a state from "directly" laying a tax on the United States. *New Mexico*, 455 U.S. at 733 (1982). However, the Constitution permits states to tax federal contractors even though the economic burden of the tax is borne by the United States. *U.S. v. Boyd*, 378 U.S. 39, 44 (1964).

Deciding upon whom the legal incidence of a tax is placed is an exacting activity. This Court has said that courts must observe

> close distinctions in order to maintain the essential freedom of government in performing its functions without unduly limiting the taxing power which is equally essential to both nation and state under our dual system.

James v. Dravo Contracting Co., 302 U.S. 134, 150 (1937). In fact, the inquiry is highly legalistic where small differences in two statutes can result, absent close analysis, in apparently inconsistent decisions. *U.S. v. Maryland*, 471

F. Supp. 1030, 1037 (D. Md. 1979). In *Maryland*, the court found the state's environmental surcharge did not constitute an unconstitutional levy on the federal government because the surcharge statute did not require that the charge be passed on to the consumer. *Id.* Like Missouri's sales tax statute, Maryland's statute provided that an inability on the seller's part to collect the surcharge did not diminish the seller's liability for the surcharge.

Missouri's taxing scheme is relatively straightforward. The tax is imposed on sellers for the privilege of engaging in the business of selling tangible personal property and certain services. Mo. Rev. Stat. § 144.020.1. The express purpose of Missouri's tax is to reach sellers, not purchasers:

> The purpose and intent [of the sales tax law] is to impose a tax upon the privilege of engaging in the business, in this state, of selling tangible personal property and [certain] services . . . .

Mo. Rev. Stat. § 144.021. These two sections reflect Missouri's intention that the legal incidence of its sales tax is to fall on the sellers of taxable property and Missouri courts have so held on repeated occasions. *Farm and Home Sav. Ass'n v. Spradling*, 538 S.W.2d 313, 316 (Mo. 1976); *Fabick and Co. v. Schaffner*, 492 S.W.2d 737 (Mo. 1973). Obviously, Missouri law permits the seller to pass on the economic incidence of its sales tax. But this Court has explicitly abandoned "the notion that the economic-as opposed to the legal-incidence of the tax is relevant" to tax immunity claims. *New Mexico*, 455 U.S. at 735 n.11.

Federal courts resolving questions of federal sovereign tax immunity from state taxation are not bound

by the state court's determination of where the legal incidence of tax falls. *Diamond Nat'l Corp. v. State Bd. of Equalization*, 425 U.S. 268, 269 (1976). "On the other hand, we are not free simply to disregard the state court's determination." *Id.* Rather, "[w]e give this finding great weight in determining the natural effect of the statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *American Oil Co. v. Neill*, 380 U.S. 451, 455-56 (1965).

The Eighth Circuit ignored this Court's admonition, determining that "the Missouri Courts' construction [is] inconsistent with the statutes' reasonable interpretation." App. at A-8. It did so without even referencing the key section of Missouri's statute, the one that makes passing on the sales tax elective. The Eighth Circuit looked not at Missouri law, but at the Massachusetts tax statute considered in *First Agric. Nat'l Bank*. Unfortunately, the court's comparison of the two statutes began and ended with their prohibitions on advertising. The court did not consider their differing treatments of the seller's obligation to pass on the sales tax.

Unlike the relevant Missouri statute, the Massachusetts statute provided that the tax

> shall be paid by the purchaser to the vendor and each vendor . . . *shall add to the sales price and shall collect from the purchaser the full amount of the tax* . . . and such tax shall be a debt from the purchaser to the vendor . . . .

392 U.S. at 347 (emphasis in original).

Missouri's taxing statute is quite different. It permits a seller to choose whether to separately identify the sales tax applicable to the transaction and, only when that is done, does the statute require the purchaser to pay the sales tax.

> Amounts which a vendor [seller] charges to and receives from the purchaser in accordance with this section shall not be includable in his gross receipts *if* the amounts are separately charged or stated.

Mo. Rev. Stat. § 144.285.5 (emphasis added).[8] The word "if," though small, is significant. It discloses the option of Missouri sellers to pass along the sales tax to the purchaser or consider the tax a cost of doing business.

A Missouri seller is directly prohibited from communicating to the purchaser that the tax "will not be separately stated and added to the selling price." Mo. Rev. Stat. § 144.080.5. If a seller were prohibited from absorbing sales tax as a cost of business, the statute would so indicate; all Missouri's statute prohibits is advertising to the purchaser the statutorily permissible failure to separately state the tax. Missouri's statute permits a seller to separately state and pass on the sales tax on the transaction to the purchaser. Conversely, the seller may decline to separately state the sales tax charge and make the duty to

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[8] When Missouri wishes to pass the legal incidence of a tax to the buyer it does so in unmistakable language. Compare Mo. Rev. Stat. § 149.015.4, concerning cigarette taxes with Missouri's sales tax. The cigarette tax statute provides that the tax "shall . . . be added to the price of the cigarettes and recovered from the ultimate consumer or user with the person first selling the cigarettes acting as an agent of the state for the payment and collection of the tax to the state." No similar language appears in Missouri's sales tax statute.

pay the sales tax part of the seller's cost of doing business. This is what happens, for example, with sales of liquor by the drink. The state imposes a sales tax on each drink sold, but when the seller does not elect to separately state the sales tax charged for the drink, the seller must pay sales tax on his total receipts.[9]

The Eighth Circuit's decision, declaring that this taxing scheme places the legal incidence of the tax on the purchaser, implicitly resurrects the now-discredited decision of *Panhandle Oil Co. v. Miss. ex rel. Knox.* 277 U.S. 218 (1928). *Panhandle* found that taxes the state imposed on the seller of gasoline levied an unconstitutional tax on federal activities because the state taxed "the means used for the performance of federal functions." 277 U.S. at 221. The tax in *Panhandle* was objectionable to the majority because "the distributors were *able* to shift its burden to the purchaser." *Gurley v. Rhoden.* 421 U.S. 200, 210 (1975) (emphasis added). "The Court has since expressly

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[9] The court of appeals makes much of the fact that a purchaser is required to pay the sales tax when it is passed on by the seller and that the seller "shall collect from the purchaser" the amount of the tax due, referencing Mo. Rev. Stat. §§ 144.060 and 144.080.4. However, reading these sections as part of the entire statute they can only be concerned with the purchaser's duty to pay the tax to the extent the seller elects to separately set it forth. Each of these sections specifically incorporate Mo. Rev. Stat. § 144.285, quoted in the text, which permits the election. Any confusion with regard to the seller's option to pass the sales tax on to the purchaser is readily resolved by reference to the pertinent regulation, Mo. Code Regs. tit. 12, § 10-3.464(1) (1994), which provides: "The sales tax collected by a seller from the purchaser may be deducted from the seller's gross receipts *if* those amounts are separately stated to the purchaser and added to the purchase price." Emphasis added. Missouri law simply does not require that the sales tax charged be passed on to the purchaser.

abandoned that view and has accepted the analysis of the dissent." *Id.*

Under this Court's current precedents, the legal incidence of a tax is upon the seller unless the taxing "statute required [the seller] to pass the tax on to the purchaser-consumer." *Id.* at 204. Missouri's taxing statute imposes no such requirement. Following *First Agric. Nat'l Bank* and *Gurley*, the legal incidence of Missouri's sales tax is on the seller -- not the purchaser. Hence, Missouri's sales tax is not laid directly on the federal government. Missouri reasonably, and thus conclusively, decided that the legal incidence of its sales tax is upon seller. *American Oil Co.*, 380 U.S. at 455-56. Any other result ignores this Court's development of legal incidence jurisprudence, improperly rejects Missouri's reasonable construction of its own sales tax law, and unjustifiably interferes with Missouri's right to raise revenues.

CONCLUSION

Petitioners urge this Court to clarify the issues presented in this case, restore the proper balance of the sovereign powers between the federal government and the states, and respectfully request this Court to grant a writ of certiorari.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3303

United States of America,	*	
	*	
Plaintiff-Appellee,	*	
	*	
v.	*	Appeal from the
	*	United States District
Janette Lohman, Director of	*	Court for the Western
Revenue, State of Missouri;	*	District of Missouri.
Missouri Department of	*	
Revenue;	*	
State of Missouri,	*	
	*	
Defendants-Appellants,	*	
	*	
Kansas City Power & Light	*	
Co.,	*	
	*	
Defendant.	*	

Submitted: May 15, 1995

Filed: January 22, 1996

Before McMILLIAN, BEAM and HANSEN, Circuit Judges.

BEAM, Circuit Judge.

Missouri imposed sales tax on electricity used at a federal facility, the Lake City Army Ammunition Plant. The United States argues that the tax is a constitutionally prohibited direct tax on the federal government. Alternatively, the United States contends that the contractor-operator of the plant, Olin Corporation, purchased the electricity from a vendor, Kansas City Power & Light Company, and then resold it to the federal government. Since the Missouri sales tax does not apply to such "sales for resale," the United States contends that the sale of electricity was not taxable.

Concluding that the "sale for resale" provision applied, the district court[1] granted the federal government's motion for summary judgment. Missouri appeals. After reviewing the grant of summary judgment de novo, we affirm because the tax is unconstitutional as a direct tax on the United States.

I. BACKGROUND

The United States Department of the Army owns the Lake City Army Ammunition Plant (the Plant), which manufactures small caliber ammunition. In 1951, the federal government entered into a contract, number DA-23-012 AV-76,[2] with Kansas City Power & Light Company (KCPL). Under the contract, KCPL "shall sell and deliver

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[1]The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

[2]Several years later, the contract number was changed to DAAA19-70-D-0001. No substantive change was effected. For simplicity's sake, we will refer to the contract by the old number or as "the 1951 contract."

to the Government and the Government shall purchase and receive from [KCPL] . . . electrical service" at the Plant. Jt. App. at 653. The contract provides that it "shall continue in effect until terminated at the option of the Government by the giving of not less than 30 days advance written notice of the effective date of termination." Id. Initially, KCPL submitted bills directly to the United States and the United States sent treasury checks to pay for the electricity. Title to the electricity passed directly from KCPL to the United States.

In an effort to reduce paperwork and administrative hassle, the federal government hired a contractor, Remington Arms, to run the plant. Shortly thereafter, the government requested that KCPL bill Remington Arms directly for all purchases. In 1962, the United States and KCPL modified the 1951 contract with a supplemental agreement.[3] Remington Arms was not a party to this agreement. The supplemental agreement provides that:

> The following paragraph is hereby inserted in the [1951] Contract:
>
> 1. SCOPE AND TERM OF CONTRACT
>
> It is understood and agreed between the parties that so long as the plant is operated for the Government by a CPFF Contractor, currently Remington Arms Company, Inc., orders for service under this contract may be placed with [KCPL] by such CPFF Contractor and will be honored to the

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[3]The 1951 contract has also been modified in other minor ways. These modifications are not relevant here.

> same extent as will orders placed by the Government, all in accordance with the terms and conditions of this contract. Furthermore, during such period of time [KCPL] agrees that placing of such orders, and payment thereof by such CPFF Contractor, will satisfy the requirements of this contract concerning minimum monthly accounts to be ordered and paid for by the Government.

Jt. App. at 674. Under the contract as modified, title to the electricity still passes directly from KCPL to the government.

In 1985, Olin Corporation succeeded Remington Arms as the CPFF Contractor for the plant.[4] Olin began informing outside vendors of the change in contractors. During this time, Olin issued a purchase order on its own stationery, referencing the 1951 contract,[5] and requesting continued electricity in accordance with the contract's terms.[6] The federal government has never provided KCPL with

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[4]Olin's contract with the federal government provides that Olin acts as an independent contractor and not as an agent of the government.

[5]Relying on an isolated typographical error, Missouri contends that Olin's purchase order references not the 1951 contract but a 1947 contract that coincidentally bears the exact number as the 1951 contract. This assertion is entirely unsupported. We agree with the district court that the 1951 contract is the contract at issue.

[6]The typewritten portion of the purchase order provides in relevant part:

> PROVIDE ELECTRIC SERVICE TO THE LAKE CITY ARMY AMMUNITION PLANT, INDEPENDENCE, MISSOURI, IN ACCORDANCE

the written notice required to formally terminate the 1951 contract.

Determining who actually purchases the Plant's electricity first became an issue during an audit of KCPL by the Missouri Department of Revenue. As the supplier of electricity, it is KCPL's responsibility to submit remitted sales tax to the Missouri Department of Revenue. The Department of Revenue, after concluding that Olin purchases the plant's electricity, assessed back taxes relating to the Plant for the period of January 1986 to September

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> WITH CONTRACT NO. DA-23-012 AV-76 . . . BETWEEN THE UNITED STATES OF AMERICA AND THE KANSAS CITY POWER & LIGHT COMPANY.
>
> . . .
>
> Effective November 3, 1985, Olin Corporation, Winchester Group, became the new Contractor-Operator of the Lake City Army Ammunition Plant under Prime Contract Number DAAA09-85-Z-0006.
>
> . . .
>
> This Purchase Order covers electric services for the period November 3, 1985 through November 2, 1986 and shall automatically be extended for another year as long as the Buyer is required to process and pay invoices under Prime Contract Number DAAA09-85-Z-0006. This purchase order shall continue in effect until terminated at the option of the Buyer/U.S. Government by the giving of not less than thirty (30) days advance written notice of the effective date of termination.
>
> The terms and conditions of this purchase order shall be the same as Government Contract No. DA-23-012 AV-76 and Purchase Order No. LCO 83843 [Remington Arms Company's purchase order].

Jt. App. at 257-61.

1989. KCPL paid the taxes under protest and commenced state administrative proceedings challenging the assessment. KCPL also brought a lawsuit against Olin, demanding payment of the taxes.

The United States Government then brought this action challenging the imposition of the sales tax. As previously indicated, the district court determined that the "sales for resale" provision applied and granted the government's motion for summary judgment.

II. DISCUSSION

Missouri argues, among other things, that an intervening decision of this circuit makes the relief granted by the district court on the "sale for resale" issue improper. See United States v. Lohman, 21 F.3d 844 (8th Cir. 1994). Rather than decide that issue, we exercise our option to affirm the district court's judgment on any grounds supported by the record. See Keller v. Bass Pro Shops, Inc., 15 F.3d 122, 123 (8th Cir. 1994). In doing so, our focus shifts to the federal government's argument that assessing Missouri sales tax upon electricity sold to the plant is an unconstitutional tax on the United States itself.

"[A] State may not, consistent with the Supremacy Clause, U.S. Const. Art. VI, cl. 2, lay a tax 'directly upon the United States.'" United States v. New Mexico, 455 U.S. 720, 733 (1982) (quoting Mayo v. United States, 319 U.S. 441, 447 (1943)). Under current conceptions of federal immunity, this prohibition means that "the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals." South Carolina v. Baker, 485 U.S. 505,

523 (1988). Taxes are considered to fall directly upon the federal government only if the legal incidence of the tax falls on the federal government itself. See, e.g., United States v. County of Fresno, 429 U.S. 452, 459-460 n. 7 (1977); New Mexico, 455 U.S. at 742.

Missouri contends that taxing the plant's electricity is not a direct tax on the United States. First, it argues that the Missouri tax statute places the legal incidence of Missouri's sales tax on the seller, KCPL, and not the purchaser. Because it is undisputed that the federal government is not the seller, Missouri reasons that the sales tax cannot possibly be a tax on the government. Alternatively, Missouri contends that even if the statute places the legal incidence of the sales tax on the purchaser, Olin purchases the electricity, not the federal government.

A.

The terms of a statute control where the legal incidence of the tax falls. "[A] sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser." First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 347 (1968); accord, United States v. Tax Comm'n, 421 U.S. 599, 608 (1975). Missouri argues that the Missouri sales tax law does not require passing the tax on to the purchaser.

The introductory portion of the Missouri sales tax statute provides, "A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state." Mo. Rev. Stat. § 144.020.1.[7]

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[7]Electricity is specifically included in this tax. See Mo. Rev. Stat. § 144.020.1(3).

Other portions, however, emphasize the purchaser's role, stating that the seller "shall collect the tax from the purchaser," and making it a misdemeanor for a purchaser to refuse to pay Missouri sales tax. Mo. Rev. Stat. §§ 144.080.4; 144.060.

To interpret this potentially conflicting language, Missouri urges us to adopt the position of the Missouri state courts, who have repeatedly construed the sales tax as a tax upon the seller. See, e.g., Centerre Bank v. Director of Revenue, 744 S.W.2d 754, 759 (Mo. 1988); Farm & Home Savings Assoc. v. Spradling, 538 S.W.2d 313, 316 (Mo. 1976). In doing so, Missouri courts have regarded the legal duty of purchasers, under section 144.060, to pay the sales tax, as essentially irrelevant. "The fact that the purchaser bears the economic burden of the sales tax does not alter the statutory scheme which imposes the sales tax on sellers." Centerre Bank, 744 S.W.2d at 759.

In determining the existence of federal immunity, we are not bound by the Missouri courts' interpretation of state tax law. Diamond Nat'l Corp. v. State Bd. of Equalization, 425 U.S. 268 (1976) (per curiam). Nonetheless, if the state courts' determination is "consistent with the statute's reasonable interpretation it will be deemed conclusive." American Oil Co. v. Neill, 380 U.S. 451, 455-56 (1965).

The Missouri courts' construction of the sales tax may be appropriate, for instance, when Missouri is attempting to collect the tax from noncompliant sellers. When evaluating the legal incidence of the tax for immunity purposes, however, we find the Missouri courts' construction inconsistent with the statutes' reasonable interpretation. As noted, Missouri law provides that the seller "shall collect from the purchaser" the amount of sales tax due. Mo. Rev. Stat. § 144.080.4. The purchaser's

failure to pay the tax is a misdemeanor. Mo. Rev. Stat. §§ 144.060. Given these provisions, and for the sole purpose of determining the existence of federal immunity, we find that the legal incidence of the Missouri sales tax falls on the purchaser.[8]

Our conclusion is confirmed by the section which prohibits sellers from "advertis[ing] or hold[ing] out or stat[ing] to the public or to any customer directly or indirectly that the [sales] tax . . . required to be collected by him, will be assumed or absorbed by the [seller,] or that it will not be separately stated and added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded." Mo. Rev. Stat. § 144.080.5. This ban against public display of a seller absorbing the tax suggests that Missouri intended for the tax to fall upon the purchaser. See, e.g., First Agricultural Nat'l Bank, 392 U.S. at 347-48 (construing a similar provision in a Massachusetts statute to imply that the tax is on the purchaser).

B.

Concluding that the Missouri statute places the legal incidence of its sales tax upon the purchaser does not end our inquiry. We must determine whether the federal government is the purchaser of the electricity. If it is, the legal incidence of the tax falls on the federal government and the tax is prohibited as a direct tax on the United States.

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[8]Missouri's argument may also have little relevance because of our ultimate conclusion that imposing the sales tax on the Plant's electricity is unconstitutional as a direct tax on the United States. As such, the sale of the electricity to the United States is a tax-exempt transaction under Missouri law. See Mo. Rev. Stat. § 144.030.1.

The United States has been actively involved in obtaining electricity. It negotiated future rates and chose the vendor for the electricity, KCPL. It executed an indefinite delivery contract with KCPL in 1951. The plain language of the 1951 contract provides that "the Government shall be liable for the minimum monthly charge specified in this contract." Jt. App. at 653. Although the 1951 contract has been modified several times, the contract is still in existence. Conversely, Olin does not have a direct contract with KCPL.[9] At most, Olin serves as the federal government's "paymaster," and has a contractual obligation to pay for the electricity under its contract with the federal government. Taken as a whole, these factors require the conclusion that the federal government, and not Olin, is the purchaser of the Plant's electricity.

Despite the federal government's involvement, Missouri contends that Olin is the purchaser because Olin fills out the paperwork and signs the checks. To support its argument, Missouri relies on cases such as United States v. New Mexico, 455 U.S. 720 (1982), and Alabama v. King & Boozer, 314 U.S. 1 (1941). Those cases do not require a denial of immunity here. In both cases, the contractors made the purchases in their own names and had direct contractual liability to the vendors. New Mexico, 455 U.S. at 743; King & Boozer, 314 U.S. at 11-12. There, the federal government did not have a separate contract with

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[9]Missouri's contention that Olin's purchase order represents a separate contract with KCPL is unsupported. The purchase order does not purport to be a separate contract. It requests KCPL to provide electric service to the Plant in accordance with the 1951 contract between the United States of America and KCPL. The third page of the purchase order reiterates that the terms and conditions of the purchase order shall be the same as the 1951 contract. For these reasons, the purchase order is most properly considered to be an administrative or procedural document.

the vendor, but attempted to obtain immunity based in part on its responsibilities under its internal contract with the contractor. New Mexico, 455 U.S. at 724, 743; King & Boozer, 314 U.S. at 8, 10. Here, the federal government has a direct contract with the vendor and the contractor does not. Because of these differences in contractual obligations, New Mexico and King & Boozer have little relevance.[10]

Although it is not controlling, our decision is supported by the reasoning of our sister circuit in United States v. Kabeiseman, 970 F.2d 739 (10th Cir. 1992). The Kabeiseman court determined that the United States was immune from Wyoming sales tax on diesel fuel used by a contractor at a federally owned facility. Id. at 744. In Kabeiseman, the contractors told the federal government how much fuel it needed, and then the federal government ordered the fuel directly from a government-chosen vendor. Although title passed directly to the federal government, the contractors accepted delivery of the fuel, exercised substantial control over the use of the fuel, and paid the bills directly to the vendor. In finding the federal government immune from the state sales tax, the Kabeiseman court relied primarily on the federal government's intensive involvement with the vendor: The United States "placed the orders for diesel fuel, as well as

---

[10]Missouri also argues that granting the federal government immunity here permits federal immunity to be acquired by the "stroke of a pen." We are mindful of the Supreme Court's wariness towards immunity that can be acquired without cost to the federal government. See New Mexico, 455 U.S. at 737 (criticizing government's technical argument that its contractors are entitled to immunity "because, among other things, they draw checks directly on federal funds, instead of waiting a time for reimbursement"). As we have previously indicated, however, the federal government's involvement here surpasses technicalities: its own credit is on the line.

taking title thereto, directly from the vendor." Id. at 743. The federal government's involvement with KCPL is similarly intensive.[11]

Aside from its constitutional argument, Missouri provides two reasons why we should consider Olin to be the purchaser of the electricity. Neither reason is persuasive. First, Missouri contends that the 1962 supplemental agreement discharged the federal government's obligation. See supra page 3. We disagree. The terms of the supplemental agreement do not unconditionally discharge the federal government from its obligations. Instead, the supplemental agreement merely permits actions by another party, Olin, to satisfy the federal government's obligations. If Olin fails to order or pay for electricity, the terms of the supplemental agreement do not exempt the federal government from liability.

Second, Missouri argues that because the federal government conceded that it might suffer tax disadvantages after implementing the supplemental agreement, it should not receive immunity from taxation. The alleged concession involves the federal government's admission that permitting contractors to deal directly with vendors was a calculated risk.[12] We do not consider the alleged

---

[11]Missouri argues that Kabeiseman is distinguishable because the checks issued by the Kabeiseman contractor were drawn directly on federal funds, rather than the reimbursement method used by Olin. The Kabeiseman court did not rely on the funding mechanism, however, and we do not consider the small funding difference to suggest a different result here.

[12]The alleged concession is as follows:

> It is the responsibility of the CPFF or other cost type contractor to utilize [federal government] indefinite delivery type contracts for any and all types of services

concession relevant in our determination of federal immunity. To do otherwise transforms cautious planning by federal bureaucrats into an invitation for states to rummage through the federal pocketbook.

We have considered Missouri's other arguments and find them to be without merit.

III. CONCLUSION

Under the present contractual arrangement, we conclude that the United States Constitution prohibits Missouri from imposing sales tax on electricity for the Lake City Army Ammunition Plant because such a tax is a direct tax on the federal government. We therefore affirm the judgment of the district court.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

and supplies where the price, quality and terms obtained are more advantageous than could be obtained otherwise. In certain instances it is possible that the Government will suffer tax disadvantages as a result of this revised procedure. The procedure has been adopted with due advertence to this fact on the basis that the overall savings possible thereby will more than offset any possible cost increase resulting from taxes.

Jt. App. at 1786.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 90-0598-CV-W-1**
	)	**90-0640-CV-W-1**
William Melcher, et al.,	)	
	)	
Defendants.	)	

[Filed July 12, 1993]

ORDER

On March 4, 1993, this Court ordered the parties to show cause why this Court should not lift the abeyance order entered in this action and enter final judgment granting the declaratory and injunctive relief sought in the amended complaint of the United States. After having considered the issues presented in the parties' briefs, and inasmuch as any review of this Court's order is properly conducted at the appellate level, it is appropriate for this Court, already having granted the United States' motion for summary judgment, to enter a final order granting the relief sought in the United States' amended complaint.

Accordingly, it is

ORDERED that the abeyance order entered in this action on March 2, 1993 is hereby lifted. It is further

ORDERED that the imposition, assessment, or collection by the State of Missouri of sales taxes on

purchases of electrical power by the contractor operator of the Plant for the operation of the Plant under its separate contract with the Army is unlawful, void, and of no effect because the contractor operator purchased the electrical power with the purpose of reselling it to the United States, and the sales to the contractor operator are not retail sales within the purview of Mo. Rev. Stat., Section 144.010.1(8). It is further

ORDERED that the defendants, their successors in office, their employees, agents, attorneys, and all persons acting in concert with them who shall receive notice thereof, are enjoined from assessing, imposing, or collecting Missouri sales tax on sales of electrical power by Kansas City Power & Light Company to the contractor operator of the Plant for the purpose of operating the Plant under its separate contract with the Army. It is further

ORDERED that plaintiff's request for its costs in this action is DENIED.

Dean Whipple
United States District Judge

Date: July 12, 1993

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-3643 WMKC

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court for
	*	the Western District of
vs.	*	
	*	
William H. Melcher,	*	
Acting Director	*	
of Revenue, State of	*	
Missouri,	*	
Missouri Department of	*	
Revenue,	*	
State of Missouri,	*	
	*	
Appellants.	*	

JUDGMENT

Appellants' agreed motion to dismiss this appeal is granted, and the appeal is hereby dismissed and remanded to the district court for further proceedings.

The court's mandate shall issue forthwith.

February 8, 1993

Order Entered Under Rule 27B(a):

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	NUMBER:
	)	90-0598-CV-W-1
RAYMOND T. WAGNER, et al.,	)	90-0640-CV-W-1
	)	
Defendants.	)	

[Filed September 8, 1992]

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_____ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__x__ **Decision by Court.** This action was briefed by the parties. The issues were reviewed and a decision has been rendered.

IT IS ORDERED that the motion of the United States for summary judgment, filed July 1, 1991 is GRANTED. It is further

ORDERED that the motion of the State of Missouri for summary judgment filed June 17, 1991, and Missouri's Supplemental Motion for Summary Judgment, filed July 31, 1991 are DENIED.

Entered on August 8, 1992
Setpember 8, 1992
Date

R.F. Connor
Clerk

Carol Kuhl
(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 90-0598-CV-W-1
	)	90-0640-CV-W-1
RAYMOND T. WAGNER, et al.,	)	
	)	
Defendants.	)	

[Filed September 8, 1992]

ORDER

This is a civil action involving the issue of whether a state may impose a tax on the sale of electrical power to a federally-owned facility operated by a private contractor-operator. Specifically, this case raises the question of whether the State of Missouri may impose Missouri sales tax on sales of electrical power used in the operation of the Lake City Army Ammunition Plant ("the Plant"). The Plant, which presently is operated by Olin Corporation, is a federally-owned facility located in Independence, Missouri used principally for the manufacture of small arms ammunition. All of the machinery and equipment at the Plant is titled to and owned by the United States and not Olin.

On April 1, 1951, Kansas City Power & Light Company ("KCPL) entered into a contract ("KCPL contract") with the United States Department of the Army, pursuant to which KCPL agreed to sell electrical power to the United States for use in operating the Plant. The KCPL

contract provides that KCPL, as the contractor, "shall sell and deliver to the government and the government shall purchase and receive from the contractor . . . electrical service at the plant." KCPL and the United States were the only parties to the KCPL contract. In 1960, the KCPL contract was modified to allow monthly billing for electrical power to be sent directly to and paid by the contractor-operator of the Plant. In 1962 a Supplemental Agreement was reached which permitted the contractor-operator to place orders with KCPL. The Supplemental Agreement stated that such orders "will be honored to the same extent as will orders placed by the government all in accordance with the terms and conditions of (the original contract). KCPL and the United States were the only parties to the Supplemental Agreement. From at least 1962 to the present, the contractor-operator at the Plant initially has paid the bills for electrical power and, pursuant to the contractor-operator's separate contract with the Army for the maintenance and operation of the plant ("M&O contract"), the contractor-operator has been reimbursed in full by the United States. Olin Corporation ("Olin") has served as the contractor-operator of the Plant since November 3, 1985.

The M&O contract between Olin and the United States is a cost-plus-award-fee contract whereby Olin receives an annual fee, in addition to the reimbursement of out-of-pocket costs incurred in operating, managing and maintaining the plant. The total fee potential is established in advance, based upon projected operations for the upcoming year. The total fee potential is divided into two components: (1) a base fee, and (2) and award fee. The base fee portion, which is 15 percent of the total fee potential, is paid in 12 approximately equal monthly installments and represents basically a fixed fee. On the other hand, the award fee portion is paid annually and is

based upon the United States' evaluation of Olin's performance in operation and management of the plant during the year. Additionally, under the M&O contract, Olin is obligated to furnish all of the qualified personnel needed to manage and operate the plant with salaries and other allowable personnel costs reimbursed by the Army.

On December 15, 1989, the Missouri Department of Revenue ("Missouri") assessed KCPL $667,562.23 for sales tax, interest and penalties on sales of electrical power used in the operation of the Plant between January 1986 and September 1989. KCPL thereafter paid this tax assessment under protest and brought suit against Olin seeking indemnification for all sales tax paid or alternatively, a judgment against Missouri declaring the sales of electrical power to the Plant to be exempt from the imposition of state sales tax. Also as a result of the tax assessment levied against KCPL, the United States brought suit against Missouri and KCPL seeking a declaratory judgment and permanent injunction prohibiting Missouri from assessing a tax on sales of electrical power used at the Plant. The two cases were consolidated by order of the Court on November 13, 1990 and are currently before this Court on cross motions for summary judgment. The material facts are not in dispute.

DISCUSSION

The State of Missouri imposes a sales tax upon "the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state." MO. REV. STAT. § 144.020.1. A sale at retail is defined as "any transfer made by any person engaged in business . . . of the ownership of or title to tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property

for valuable consideration." MO. REV. STAT. § 144.010.1(8) (emphasis added). The statutes specifically include sales of electricity or electrical current as possible retail sales in Missouri. MO. REV. STAT. § 144.020.1(3).

In protesting Missouri's assessment of sales tax on the sales of electrical power to the Plant, the United States and Olin alternatively argue that, either the proposed sales tax violates principles of constitutional federalism or that the transaction at issue is "for resale" and therefore exempted from the coverage and scope of the Missouri sales tax law. With regard to the former analysis, the United States and Olin argue that, pursuant to the KCPL contract, the United States is the real purchaser of the electrical power. They assert that Olin, as the contractor-operator, merely performs the simple task of paying the electrical bill, for which Olin is fully reimbursed by the United States pursuant to the M&O contract. Therefore, the United States and Olin argue, because the sale of electricity occurs between the KCPL and the United States, it is not a sale upon which Missouri may impose a tax inasmuch as the Supremacy Clause of the Constitution prohibits a state from levying any tax directly upon the United States. United States v. Mexico, 455 U.S. 720, 733 (1982). In response to this argument, Missouri asserts that the sale of the electrical power, in fact, is a taxable sale inasmuch as Olin, and not the United States, uses and consumes the electricity at the plant. In addition, Olin and the United States argue that if Olin is found to purchase the electrical power from KCPL, it does so for resale to the United States making the transaction exempt from Missouri sales tax under MO. REV. STAT. § 144.010.1(8). In United States v. Benton, 772 F. Supp. 453 (W.D.Mo. 1990), Judge Hunter of this Court addressed the question of whether sales from various vendors of tangible personal property to Olin were sales that could be taxed by the State of Missouri. The

Court in Benton concluded that the sales of the those properties were sales for "resale" to the United States and thus were exempt under Missouri law. Judge Hunter reasoned that because the transaction resulted in immediate passage of title from a third party vendor to the United States, at the time of delivery, the only significant interest Olin possessed in the property was temporary dominion to designate the transfer of title. Id. at 461. The Court in Benton reasoned that once title passed, Olin no longer had dominion over the property and the United States had discretion as to the utilization of the property. "Thus, a resale is effected, making Olin's purchases of tangible personal property in accord with its contract with the U.S., a nontaxable transaction pursuant to § 144.010.(8)." Id.

The reasoning in Benton is equally applicable, and persuasive, in the instant case.[1] There is no meaningful basis for distinction between the tangible personal property sold in Benton and the intangible electrical power sold in the instant case. The Missouri sales tax statutes explicitly include retail sales of electrical power as taxable to the same extent as retail sales of tangible personal property. Likewise, the "resale" of electrical power should be exempt from the Missouri sales tax just as the resale of tangible personal property as concluded in Benton.

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[1]The only critical factual distinction between these two cases would appear to be the existence in the instant case of a contract directly between the vendor (KCPL) and the United States. In Benton, Olin, and not the United States, had contracted with the third party vendors. The fact that a contract between KCPL and the United States exists in the instant case makes it more likely the United States, rather than Olin, purchases the electrical power. If such is the case, of course, the same result would ensue as that reached in Benton and in this opinion inasmuch as the sale of the electrical power would be exempt from a state's sales tax pursuant to the Supremacy Clause.

Accordingly, for the foregoing reasons, it is

ORDERED that the motion of the United States for summary judgment, filed July 1, 1991, is GRANTED. It is further

ORDERED that the motion of the State of Missouri for summary judgment, filed June 17, 1991, and Missouri's Supplemental Motion for Summary Judgment, filed July 31, 1991 are DENIED.

_____

DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE

DATE: Sept. 8, 1992

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Mo. Rev. Stat. § 144.010.1(8)(b) (Supp. 1995)

144.010. Definitions.—1. The following words, terms, and phrases when used in sections 144.010 to 144.510 have the meanings ascribed to them in this section, except when the context indicates a different meaning:

* * * * *

(8) **"Sale at retail"** means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; except that, for the purposes of sections 144.010 to 144.510 and the tax imposed thereby: (i) purchases of tangible personal property made by duly licensed physicians, dentists, optometrists and veterinarians and used in the practice of their professions shall be deemed to be purchases for use or consumption and not for resale; and (ii) the selling of computer printouts, computer output or microfilm or microfiche and computer assisted

photo compositions to a purchaser to enable the purchaser to obtain for his own use the desired information contained in such computer printouts, computer output on microfilm or microfiche and computer assisted photo compositions shall be considered as the sale of a service and not as the sale of tangible personal property. Where necessary to conform to the context of sections 144.010 to 144.510 and the tax imposed thereby, the term "sale at retail" shall be construed to embrace. . . .

* * * * *

(b) Sales of electricity, electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers. . . .

Mo. Rev. Stat. § 144.020.1(1) and (3) (1994)

144.020. Rate of tax. - A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, except as otherwise provided in section 144.025;

* * * * *

(3) A tax equivalent to four percent of the basic rate paid or charged on all sales of electricity or electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers. . . .

Mo. Rev. Stat. § 144.021 (1994)

144.021. Imposition of tax - seller's duties. - The purpose and intent of sections 144.010 to 144.510 is to impose a tax upon the privilege of engaging in the business, in this state, of selling tangible personal property and those services listed in section 144.020. The primary tax burden is placed upon the seller making the taxable sales of property or service and is levied at the rate provided for in section 144.020. Excluding sections 144.070, 144.440 and 144.450, the extent to which a seller is required to collect the tax from the purchaser of the taxable property or service is governed by section 144.285 and in no way affects sections 144.080 and 144.100, which require all sellers to report to the director of revenue their **"gross receipts"**, defined herein to mean the aggregate amount of the sales price of all sales at retail, and remit tax at four percent of their gross receipts.

Mo. Rev. Stat. § 144.060 (1994)

144.060. Purchaser to pay sales tax - refusal, a misdemeanor - exception. - It shall be the duty of every person making any purchase or receiving any service upon which a tax is imposed by sections 144.010 to 144.510 to pay, to the extent possible under the provisions of section 144.285, the amount of such tax to the person making such sale or rendering such service; any person who shall willfully and intentionally refuse to pay such tax shall be

guilty of a misdemeanor; provided, however, that the provisions of this section shall not apply to any person making any purchase or sale of a motor vehicle subject to sales tax as provided by the Missouri sales tax law.

Mo. Rev. Stat. § 144.080.4 and .5 (1994)

144.080. Seller responsible for tax - returns - unlawful to advertise absorption of tax - penalty.

* * * * *

4. The seller of any property or person rendering any service, subject to the tax imposed by sections 144.010 to 144.525, shall collect the tax from the purchaser of such property or the recipient of the service to the extent possible under the provisions of section 144.285, but his inability to collect any part or all of the tax does not relieve him of the obligation to pay to the state the tax imposed by section 144.020; except that the collection of the tax imposed by sections 144.010 to 144.525 on motor vehicles and trailers shall be made as provided in sections 144.070 and 144.440.

5. It shall be unlawful for any person to advertise or hold out or state to the public or to any customer directly or indirectly that the tax or any part thereof imposed by sections 144.010 to 144.525, and required to be collected by him, will be assumed or absorbed by the person, or that it will not be separately stated and added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Mo. Rev. Stat. § 144.285 (1994)

144.285. Tax brackets to be established by director of revenue - how applied - taxpayer owing more than one political subdivision, distribution, penalties. - 1. In order to permit sellers required to collect and report the sales tax to collect the amount required to be reported and remitted, but not to change the requirements of reporting or remitting tax or to serve as a levy of the tax, and in order to avoid fractions of pennies, the director of revenue shall establish brackets, showing the amounts of tax to be collected on sales of specified amounts, which shall be applicable to all taxable transactions.

2. In all instances where statements covering taxable purchases are rendered to the taxpayer on a monthly or other periodic basis, the amount of tax shall be determined by applying the applicable tax rate to the taxable purchases represented on the statement, rounded to the nearest whole cent, or by application of the brackets established by the director of revenue, at the option of the retail vendor.

3. No vendor or seller shall knowingly charge or receive from a purchaser as a sales tax any sum in excess of the sums provided for in this section.

4. A vendor may, at his option, determine the amount charged to and received from each purchaser by use of a formula which applies the applicable tax rate to each taxable purchase, rounded to the nearest whole cent. The formula shall be uniformly and consistently applied to all purchases similarly situated.

5. Amounts which a vendor charges to and receives from the purchaser in accordance with this section

shall not be includable in his gross receipts if the amounts are separately charged or stated.

6. If sales tax for one or more local political subdivisions is owed by a taxpayer pursuant to chapter 66, 67, 92, or 94, RSMo, and that taxpayer remits less than all sales tax due for a filing period specified in section 144.080, the director of revenue shall deposit the tax remitted proportionately to each taxing jurisdiction in accordance with the percentage that each such jurisdiction's share of the tax due for the filing period bears to the total tax due from such taxpayer for such period. The unpaid balance due along with penalties and interest shall be similarly prorated among the state and all local jurisdictions for which tax was due during the filing period for which an underpayment occurs. The provisions of this subsection shall apply to all returns or remittances relating to sales made on or after January 1, 1984.

Mo. Rev. Stat. § 149.015.4 (1994)

149.015. Rate of tax - how stamped - samples, how taxed - tax impact to be on consumer - fair share school fund, distribution.

* * * * *

4. It shall be the intent of this chapter that the impact of the tax levied hereunder be absorbed by the consumer or user and when the tax is paid by any other person, the payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user with the person first selling the cigarettes acting as an agent of the state for the payment and collection of the tax to the

state, except that in furtherance of the intent of this chapter no refund of any tax collected and remitted by a retailer upon gross receipts from a sale of cigarettes subject to tax under this chapter shall be claimed under chapter 144, RSMo, for any amount illegally or erroneously overcharged or overcollected as a result of imposition of sales tax by the retailer upon amounts representing the tax imposed under this chapter.

Supreme Court, U.S.
FILED
MAY 23 1996
CLERK

(2)

No. 95-1728

In the Supreme Court of the United States

OCTOBER TERM, 1995

JANETTE LOHMAN, THE MISSOURI DEPARTMENT OF REVENUE AND THE STATE OF MISSOURI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
DAVID ENGLISH CARMACK
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

18 pp

QUESTION PRESENTED

Whether application of the Missouri sales tax to electricity sold under a contract with the United States for use at a federal ammunition plant located in Missouri violates the constitutional immunity of the United States from state taxation.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1728

JANETTE LOHMAN, THE MISSOURI DEPARTMENT OF REVENUE AND THE STATE OF MISSOURI, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 74 F.3d 863. The opinions of the district court (Pet. App. A14-A15, A17-A24) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1996. The petition for a writ of certiorari was filed on April 22, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1951, the United States entered into a contract to purchase electricity from the Kansas City Power & Light Company (KCPL). Under that contract, KCPL agreed to "sell and deliver to the Government" and the United States agreed to "purchase and receive from [KCPL] * * * electrical service" at the federally-owned Lake City Army Ammunition Plant, where small caliber ammunition is manufactured (Pet. App. A2-A3). The contract provides that it "shall continue in effect until terminated at the option of the Government by the giving of not less than 30 days advance written notice of the effective date of termination" (*id.* at A3).

Under the contract, title to the electricity passed directly from KCPL to the United States upon delivery at the plant. KCPL submitted bills for electricity directly to the United States. The bills were paid with checks drawn on the Treasury (Pet. App. A3).

The United States hired the Remington Arms Company to manage the ammunition plant (Pet. App. A3, A20). In 1962, the United States modified its contract with KCPL to provide (*id.* at A3-A4):

> [S]o long as the plant is operated for the Government by a CPFF [cost plus fixed fee] Contractor, currently Remington Arms Company, Inc., orders for service under this contract may be placed with [KCPL] by such CPFF Contractor and will be honored to the same extent as will orders placed by the Government, all in accordance with the terms and conditions of this contract. Furthermore, during such period of time [KCPL] agrees that placing of such orders,

> and payment thereof by such CPFF Contractor, will satisfy the requirements of this contract concerning minimum monthly accounts to be ordered and paid for by the Government.

The Remington Arms Company was not a party to this contract. The United States has never provided KCPL with the written notice required to terminate the contract (*id.* at A3, A4-A5).

Under the contract, as modified, title to the electricity delivered by KCPL to the federally-owned substations at the ammunition plant continued to pass directly from KCPL to the United States (Pet. App. A3, A4; JA 512, 1515, 1531).[1] Under the separate contract between the United States and the plant manager, the manager was required to pay the bills for electrical power delivered by KCPL and was reimbursed for those payments by the United States (Pet. App. A20).

In 1985, Olin Corporation succeeded Remington Arms Company as the plant manager. The contract between Olin and the United States requires Olin to provide "qualified personnel to perform payment procedures" for the government's contract to purchase electricity from KCPL (JA 1249). The payment procedures included validating that the "rate per kilowatt hour (KWH) on invoice is equal to approved rate per KWH provided in current Dept of Army purchase contract for electricity" and making "payment to each utility company for validated amount of invoice" (*ibid.*). Olin informed KCPL in writing that Olin had assumed the administrative function of processing and paying invoices for de-

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[1] "JA" refers to the joint appendix filed in the court of appeals.

livery of electricity under the government's contract with KCPL. Olin requested KCPL to continue electrical services in accordance with the government's contract with KCPL and advised that Olin would process and pay the invoices for such electrical service (Pet. App. A4; JA 257-261).[2]

2. The State of Missouri imposes a tax upon "the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state" (Mo. Rev. Stat. § 144.020.1 (1996); Pet. App. A7, A21, A27). The sale of electricity is specifically included within the scope of this tax (Mo. Rev. Stat. § 144.020.1(3) (1996); Pet. App. A7 n.7, A22, A27). A sale at retail is defined as "any transfer made by any person engaged in business * * * of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration" (Mo. Rev. Stat. § 144.010.1(8) (1996); Pet. App. A21-A22, A25). The seller "shall collect the tax from the purchaser" (Mo. Rev. Stat. § 144.080.4 (1996); Pet. App. A8, A28). It is a misdemeanor for the seller to "advertise or hold out or state to the public or to any customer directly or indirectly that the tax or any part thereof * * * required to be collected by him, will be assumed or absorbed by the person, or that it will not be separately stated and added to the selling price of the property sold or the service rendered, or if added, that it or any part thereof will be refunded" (Mo. Rev. Stat.

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[2] The manager of Olin's accounting department testified that Olin did not order any electricity but merely advised KCPL of the change in the contract operators at the government's facility (JA 450, 454, 480-481).

§ 144.080.5 (1996); Pet. App. A9, A28). It is also a misdemeanor for the purchaser to refuse to pay the tax that the seller is required to collect and remit to the State (Mo. Rev. Stat. § 144.060 (1996); Pet. App. A8, A27-A28).

3. In connection with a compliance audit, the Missouri Department of Revenue assessed taxes against KCPL for electricity delivered to the federal ammunition plant for the period from January 1986 to September 1989 (Pet. App. A5-A6, A21). KCPL paid the taxes under protest and commenced state administrative proceedings challenging the assessment.[3] KCPL also commenced an action in state court seeking indemnification from Olin for any sales tax due or, alternatively, a judgment against the State declaring the sales of electrical power under KCPL's contract with the United States to be exempt from the state sales tax (*id.* at A5-A6, A21).

The United States then brought this action in federal district court seeking a declaration either (i) that the electricity sold by KCPL under its contract with the United States was not subject to state taxation or, (ii) in the alternative, that, if the electricity were deemed to have been purchased by Olin, that purchase would be exempt from tax under state law as a purchase for resale to the United States. The complaint also sought an injunction to prohibit assessment and collection of the state tax on these sales of electricity (Pet. App. A2, A6). The state court suit that KCPL had commenced was removed to federal court and consolidated with the action brought by the United States (*id.* at A21).

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[3] The administrative proceedings were stayed pending disposition of the present case (Pet. App. A15).

4. The district court acknowledged that the contract between KCPL and the United States "makes it more likely the United States, rather than Olin, purchase[d] the electrical power" (Pet. App. A23 n.1). The court also noted that, if the electricity had been purchased by the United States, "the sale of the electrical power would be exempt from a state's sales tax pursuant to the Supremacy Clause" (*ibid.*). The court, however, did not rest its decision on that rationale.

Instead, the court concluded that, if the sales by KCPL had been made to Olin, then Olin purchased the electrical power for resale to the United States, and the sales would therefore be exempt from state tax as sales for resale under applicable state law (Pet. App. A2, A15, A22-A23, citing Mo. Rev. Stat. § 144.010.1(8) (1996)).[4] The court thus concluded that, whether the purchaser was the United States or Olin, these sales of electricity were not properly subject to the state sales tax (Pet. App. A23). The court therefore enjoined petitioners "from assessing, imposing, or collecting Missouri sales tax on sales of electrical power by Kansas City Power & Light Company to the contractor operator of the Plant for the purpose of operating the Plant under its separate contract with the Army" (*id.* at A15).

5. The court of appeals affirmed. The court concluded that, under the contract between the United

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[4] The district court relied for that conclusion on that court's prior decision in *United States* v. *Benton*, 729 F. Supp. 671 (W.D. Mo. 1990), and 772 F. Supp. 453 (W.D. Mo. 1990), aff'd, 975 F.2d 511 (8th Cir. 1992), cert. granted and judgment vacated sub nom. *United States* v. *Melcher*, 508 U.S. 957 (1993), rev'd on jurisdictional grounds sub nom. *United States* v. *Lohman*, 21 F.3d 844 (8th Cir. 1994).

States and KCPL, sales of electricity were made to the United States, not to its contractor, and that state taxation of those sales is prohibited by the Supremacy Clause of the Constitution (Pet. App. A1-A13).

The court noted that a "State may not, consistent with the Supremacy Clause, * * * lay a tax 'directly upon the United States'" (Pet. App. A6, quoting *United States* v. *New Mexico*, 455 U.S. 720, 733 (1982), quoting *Mayo* v. *United States*, 319 U.S. 441, 447 (1943)). The court rejected petitioners' claim that the legal incidence of the Missouri sales tax was on the seller (KCPL), rather than on the purchaser, and thus could not be on the United States. The court noted that a "sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (Pet. App. A7, quoting *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347 (1968)). Missouri law requires the tax to be passed on to the purchaser because (i) Mo. Rev. Stat. § 144.080.4 (1996) requires the seller to collect the sales tax from the purchaser, (ii) Mo. Rev. Stat. § 144.060 (1996) makes it a misdemeanor for a purchaser to fail to pay the tax, and (iii) Mo. Rev. Stat. § 144.080.5 (1996) prohibits a seller from "advertis[ing] or hold[ing] out or stat[ing] to the public or to any customer directly or indirectly that the [sales] tax * * * required to be collected by him, will be assumed or absorbed by the [seller,] or that it will not be separately stated and added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded" (Pet. App. A7-A9).

The court of appeals further explained that, under the contract with KCPL, the purchaser was the

United States (Pet. App. A9-A13). The court noted that the United States alone had contractual liability for the minimum monthly charge under the contract, that Olin did not have a direct contract with KCPL and that pursuant to Olin's contract with the federal government to pay for the electricity, Olin served merely as the federal government's "paymaster" (*id.* at A10).

The court rejected the contention that Olin had a separate contractual relationship with KCPL. The court pointed out that Olin, by correspondence with KCPL, had requested only that KCPL provide electric service to the ammunition plant in accordance with the 1951 contract between the United States and KCPL. The court stated that this correspondence, which the State regarded as a contractual purchase order, "is most properly considered to be an administrative or procedural document" (*id.* at A10 n.9).

The court also rejected petitioners' reliance on *United States* v. *New Mexico*, 455 U.S. 720 (1982), and *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941). The court explained that, "unlike those cases where the federal government did not have a separate contract with the vendor, but attempted to obtain immunity based in part on its responsibilities under its internal contract with the contractor," here "the federal government has a direct contract with the vendor and the contractor does not" (Pet. App. A10-A11). The court noted that Olin's role as plant manager did not discharge the federal government from its obligation to KCPL for the purchase of electricity. Instead, it merely permitted "actions by another party, Olin, to satisfy the federal government's obligations" (*id.* at A12-A13).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court, any other court of appeals or the Missouri Supreme Court. Further review is therefore not warranted.

1. "[A] State may not, consistent with the Supremacy Clause, Art. VI, cl. 2, lay a tax 'directly upon the United States.'" *United States* v. *New Mexico*, 455 U.S. 720, 733 (1982), quoting *Mayo* v. *United States*, 319 U.S. 441, 447 (1943). A tax falls directly upon the United States if the legal incidence of the tax falls on the federal government. *United States* v. *New Mexico*, 455 U.S. at 742. If the United States is the purchaser, and if the legal incidence of the state tax falls on the purchaser, the tax falls directly upon the United States and is prohibited by the Supremacy Clause.

Whether the legal incidence of a state tax falls on the United States is a federal question. *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347 (1968).[5] Under the decisions of this Court, when "a State requires that the sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 608 (1975). Accord, *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. at 347.

Properly applying these controlling decisions, the court of appeals correctly held that the legal inci-

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[5] In making that determination, federal courts are not bound by decisions of state courts. *Diamond National Corp.* v. *State Bd. of Equalization*, 425 U.S. 268 (1975).

dence of the Missouri sales tax is upon the purchaser and therefore upon the United States in this case (Pet. App. A7-A9). The court recognized that Mo. Rev. Stat. § 144.020.1 levies a tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property * * * at retail in this state" (Pet. App. A7). But the court correctly observed that other provisions of Missouri law reveal that this tax must be passed on to, and collected from, the purchaser. In particular, (i) Mo. Rev. Stat. § 144.080.4 (1996) requires the seller to collect the sales tax from the purchaser, (ii) Mo. Rev. Stat. § 144.060 (1996) makes it a misdemeanor for the purchaser to refuse to pay the tax and (iii) Mo. Rev. Stat. § 144.080.5 (1996) prohibits sellers from advertising or stating in public or to customers directly or indirectly that the sales tax "required to be collected by [the seller]" from the purchaser will be assumed by the seller. Under this Court's decisions, these requirements of Missouri law—that the vendor pass the tax on to, and collect it from, the purchaser—establish that the legal incidence of the tax is on the purchaser. See *United States* v. *Mississippi Tax Comm'n*, 421 U.S. at 608. Moreover, as this Court noted in *First Agricultural National Bank* v. *State Tax Comm'n*, 392 U.S. at 347-348, this conclusion is buttressed by the state prohibition against advertising by sellers that they would absorb the tax.

The court of appeals was not unmindful in this case that Missouri courts have held, for purposes of state law, that the legal incidence of the state tax falls on the seller (Pet. App. A8, citing, *e.g.*, *Farm & Home Savings Ass'n* v. *Spradling*, 538 S.W.2d 313, 316 (Mo. 1976)). As the court of appeals observed, "[t]he Missouri courts' construction of the sales tax may be

appropriate, for instance, when Missouri is attempting to collect the tax from noncompliant sellers" (Pet. App. A8). It is well established, however, that in evaluating the constitutional immunity of the United States from state taxation, federal courts are not bound by the State's characterization of its statutory scheme (note 5, *supra*). Instead, as this Court has held, when "the sales tax [is] passed on to the purchaser and [is to] be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States* v. *Mississippi Tax Comm'n*, 421 U.S. at 608.

2. Petitioners err in contending (Pet. 15-16) that the United States was not the purchaser of electricity under the contractual arrangement existing in this case. The United States entered the contract with KCPL in 1951 for the indefinite delivery of electricity to the Plant. That contract provides that KCPL will "sell and deliver" and that the federal government will "purchase and receive" electrical power for the operation of the Plant (Pet. App. A10). The contract makes the United States liable for the electricity delivered under that contract, including a minimum monthly charge (*ibid.*). Neither Remington nor Olin was ever a party to that contract.

As the court of appeals correctly determined (Pet. App. A10), Olin had no contract with KCPL. Instead, under Olin's contract with the federal government, Olin simply agreed to pay (and be reimbursed by the United States) for the electricity delivered under the government's contract with KCPL (*ibid.*).[6]

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[6] As the court of appeals correctly concluded (Pet. App. A10 n.9), the correspondence that Olin sent to KCPL does not

3. Because the legal incidence of the Missouri sales tax falls upon the United States as purchaser, the court of appeals correctly concluded that the sale of electricity by KCPL to the United States was immune from the Missouri sales tax. See *United States* v. *New Mexico*, 455 U.S. at 742; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954)). Petitioners err in asserting (Pet. 16-20) that this holding conflicts with *United States* v. *New Mexico*, *supra*, *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941), *United States* v. *District of Columbia*, 669 F.2d 738 (D.C. Cir. 1981), and *United States* v. *Forst*, 442 F. Supp. 920 (W.D. Va. 1977), aff'd, 569 F.2d 811 (4th Cir. 1978).

In each of those cases, the contractors made the purchases in their own names and were directly liable under contracts that they had made with the sellers; the United States had no direct contract with the sellers in any of those cases. *United States* v. *New Mexico*, 455 U.S. at 743; *Alabama* v. *King & Boozer*, 314 U.S. at 11-12; *United States* v. *District of Columbia*, 669 F.2d at 739-740, 744; *United States* v. *Forst*, 442 F. Supp. at 922. In the present case, the situation is quite different—indeed, it is the opposite. In this case, the United States contracted with the seller for the delivery of electricity. The United States is directly liable under this contract for the electricity delivered. The electrical power was delivered to the government's substation at the ammunition plant. Only the credit of the United States is involved. Olin

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represent a separate contract between Olin and KCPL. Instead, it informs KCPL that Olin will receive and pay the bills owed by the United States for the electricity delivered to the plant under the government's contract with KCPL.

did not contract for electricity to be supplied; nor did Olin extend its credit for the electricity that was delivered. Olin's only duty was to serve as the "paymaster" of the government in paying for the electricity that was delivered (Pet. App. A10).

The court of appeals correctly noted (Pet. App. A11-A12) that this case is similar to *United States* v. *Kabeiseman*, 970 F.2d 739 (10th Cir. 1992), in which the federal government ordered fuel for various facilities based upon information supplied to it by contractors. Title to the fuel passed directly from the vendors to the federal government. The contractors accepted delivery of the fuel, exercised substantial control over the use of the fuel and paid the bills directly to the vendor. Because the United States "placed the orders for diesel fuel, as well as taking title thereto, directly from the vendor" (*id.* at 743), the Tenth Circuit concluded that the United States, as purchaser of the fuel, was not subject to the Wyoming sales tax.[7]

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[7] Petitioners contend (Pet. 13-14) that the definition of a "sale at retail" in Mo. Rev. Stat. § 144.010.1(8) (1996) indicates that Olin, not the United States, is the purchaser. That contention is not correct. That section of the statute defines a "sale at retail," which is subject to the sales tax, as "any transfer made by any person engaged in business * * * of ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." Petitioners assert that Olin must be regarded as the purchaser because Olin used the electricity (Pet. 13-14). But title to and control over the electricity passed directly to the United States at its substation under its contract with KCPL. Any right of Olin to use this electricity or any other property that the United States supplied came from Olin's contract with the United States.

The decision of the court of appeals represents the application of settled law to the facts of this case. Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 95-1728

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JANETTE LOHMAN,
THE MISSOURI DEPARTMENT
OF REVENUE AND THE STATE OF MISSOURI,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

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On Petition For Writ Of Certiorari
To The United States Court of Appeals
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PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

The omissions from the Brief of the United States in Opposition (Brief in Opp.) are as telling as what the brief actually says. Both indicate the necessity of review by this Court. Without such review Missouri and eventually other states will be denied their sovereign right to place the legal incidence of their sales tax where they choose and the federal government will have secured sovereign tax immunity for the purchasing activities of one of its contractors, in contravention of this Court's precedents.

1. The government, quoting from its 1951 Contract, says that Kansas City Power & Light Company (KCPL) agreed to "sell and deliver to the Government" and the government agreed to "purchase and receive ... electrical service." Brief in Opp., p. 2. The government's brief then jumps to a 1962 amendment of the Contract. The brief ignores the significant events of 1960 that the 1962 amendment merely memorialized. In 1960 the government issued a "procedure governing purchases" by Remington (Olin's predecessor) and every other federal management contractor "under indefinite delivery type contracts negotiated by government agencies," such as the 1951 Contract with KCPL. JA, Vol. VI, 1785.[1] Under this procedure the

[1] "JA" refers to the joint appendix filed in the court of appeals.

operators were to directly order and pay for electricity. The government "expected that almost without exception vendors holding Government contracts of this type will accept the ... contractor's purchase or delivery orders in lieu of Government orders." *Id.* KCPL readily accepted the new procedure and Remington's purchase order. JA, Vol. VI, 1792-96. Remington thus became the "purchaser" of the electricity and labeled itself as such. JA, Vol. V, 1709. When Olin took over the operation of the Plant, it continued to perform Remington's purchasing activities, ordering and paying for the electricity.[2]

In 1960 the federal government recognized that the change in the method of ordering and paying for electricity was likely to have tax consequences. JA, Vol. VI, 1785-1787. The federal government then amended the Contract with KCPL to specifically permit its Plant operator to order and pay for the electricity. JA, Vol. III, 674. After Olin became the contractor-operator of the Plant, Olin issued a purchase order in its own name to KCPL, listing itself as "buyer," directing KCPL to replace Remington's purchase order and prime contract numbers with Olin's, assigning rating DO C-3 (applicable only to "purchases" of supplies, JA, Vol. III, 866-67) to the purchase order and asserting a right to cancel the 1951 Contract for the delivery of electrical services. JA, Vol. V, pp. 1618-1622. KCPL complied with all the directives in Olin's purchase order (JA, Vol. V, pp.

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[2] The government labels Olin's purchase order mere "correspondence." Brief in Opp., p. 11, n 6. The document is actually and accurately labeled a purchase order. JA, Vol. V, 1618-1622. Contrary to the Eighth Circuit's labeling of this document as an administrative purchase order, Olin has only one form of purchase order. JA, Vol. VI, 1976.

1677, 1681 & 1683), and listed Olin as its "customer" on future invoices. JA, Vol. V, 1660-76. Olin uses the electricity it orders to run the Plant and pays for it with its private funds.

The federal government says an Olin witness testified that Olin did not order the electricity. Brief in Opp., p. 4, n 2. Of what consequence then was the 1962 Contract amendment, quoted by the government, calling for KCPL to accept orders for electrical service from the Plant's contractor-operators? The federal government offers no explanation and the evidence does not demonstrate that the government resumed ordering electricity for the Plant. The federal government did find an Olin employee who testified, on May 15, 1991, that Olin did not order electricity. Of course, this testimony directly contradicted the prior testimony of the federal government's own employee/witness (the contract administrator at the Plant), the first witness heard in the case. He testified at the preliminary injunction hearing on September 14, 1990 and his testimony was clear and unambiguous; Olin ordered the electricity.[3]

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[3] His testimony was as follows:

Q: Is it correct ... to say that the contractor-operator of the plant orders the [electrical] service that is delivered?

A: It is correct to say that this agreement [the 1962 amendment] indicates that the contractor-operator orders for service may be placed with the contractor, meaning Kansas City Power & Light, yes.

Q: So is it fair to say that Olin orders the electrical power under this agreement?

A: Yes.

JA, Vol. I, 130.

Missouri was entitled to rely on this admission by the government's employee/witness, and the government is precluded from using its later-acquired inconsistent testimony to defeat Missouri's motion for summary judgment. *E.g., Prosser v. Ross*, 70 F.3d 1005, 1008 (8th Cir. 1995). The government's attempt to ignore Olin's purchase order and the testimony of its own employee/witness demonstrates the weakness of its position.[4] Under the circumstances of this case, no constitutional basis exists for denying Missouri its sovereign power to tax KCPL's transfer of the electricity to Olin. It is not only the facts of this case that are compelling.

2. Without ever mentioning the provisions of Missouri law making the transfer of the state's sales tax elective, the federal government (like the Eighth Circuit) asserts that "Missouri law [not federal law] requires the [sales] tax to be passed on to the purchaser." Brief in Opp., pp. 7 & 10. This declaration of Missouri law is false. To deny this petition would authorize the courts of appeal to declare the meaning of state tax laws without considering the entire state statute -- a practice that would wreak havoc with state tax jurisprudence.

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[4] This weakness is further demonstrated by the government's suggestion that the district court did not resolve who purchased the electricity. The federal government says "the court concluded that, *if* the sales by KCPL had been made to Olin, then Olin purchased the electrical power for resale to the United States ...." Brief in Opp., p. 6, emphasis added. There was no "if" in the district court's order. Rather, the district court ordered Missouri to cease the imposition of sales tax "on purchases of electrical power by the contractor operator of the Plant ... because the contractor operator purchased the electrical power with the purpose of reselling it the United States." Petitioners' Appendix, A-15.

The federal government, supported by the Eighth Circuit, concludes that Missouri law requires a seller to pass along the state's sales tax to the purchaser. Both rely on Mo. Rev. Stat. § 144.080.4, providing that a seller "shall collect the tax from the purchaser", and § 144.060, imposing a duty on the purchaser to pay the tax to the seller. But even these two sections point to Missouri's statutory reality: the seller is not required to pass along the state's sales tax to the purchaser. Both sections explicitly reference Mo. Rev. Stat. § 144.285, which the federal government and the court of appeals are determined to ignore.

This section, along with Mo. Rev. Stat. § 144.080.5, grants sellers the privilege of stating a price for their merchandise unadorned by the inclusion of sales tax. Under § 144.285.5 the amounts that a seller collects from a purchaser as sales tax are excluded from the computation of taxable gross receipts "if," and only "if", the sales tax amount has been "separately charged or stated." Similarly, § 144.080.5 prohibits a seller from advertising that sales tax "will not be separately stated and added to the selling price." Nothing in Missouri law prohibits a Missouri seller from failing to separately state and add to the sales price the amount of the tax. Under Missouri law the seller may elect to separately state the tax applicable to a sale and thereby require the purchaser to pay it, or the seller may elect to state only the final sales price and thereby include the tax as a cost of doing business. Missouri's relevant tax regulation, complete with demonstrative examples, confirms this reading of the law and is reprinted in the supplemental appendix attached hereto.

Missouri law does not require a seller to separately state and add to the purchase price the sales tax due on the

transaction. Once the voluntariness of charging the purchaser for the sales tax is established, the law discussed in the Petition readily demonstrates that the legal incidence of Missouri's sales tax is laid upon the seller and not the purchaser. Permitting the contrary result reached by the Eighth Circuit to stand infringes on Missouri's and every other state's sovereign right to place the legal incidence of their sales tax where they choose.

3. The Eighth Circuit and the federal government find comfort in the result reached in *U.S. v. Kabeiseman*, 970 F.2d 739 (10th Cir. 1992), but it is the distinctions between *Kabeiseman* and this case that dictate a different result here. In *Kabeiseman* the federal government contracted for the delivery of diesel fuel to be delivered to a federal facility that produced crude oil and natural gas. There were no modifications of the contracts there at issue to permit the operator of the federal facility (rather than the government itself) to order and pay for the diesel fuel. There was no government description of the activities to be undertaken by the operator as a purchase. There was no document issued by the operator, labeled a purchase order, describing the operator as the buyer. All these facts are present in this case.

Furthermore, the court in *Kabeiseman* mentions three times that the operator issued checks on federal funds for the diesel fuel delivered to the federal facility. Here Olin pays for the electricity with its own private funds; it later requests reimbursement for these funds on a document labeled "Public Voucher for *Purchases* and Services Other than Personal." JA, Vol. I, 157 and Vol. II, 319 (emphasis added). Olin is the federal government's independent contractor (JA, Vol. V, 1577), not its purchasing agent (JA, Vol. VI, 1805).

But the federal government says that "[o]nly the credit of the United States is involved" in the transaction at issue here. Brief in Opp., p. 12. Not so. Olin's credit is involved. In this regard this case is like *Alabama v. King & Boozer*, 314 U.S. 1, 10 (1941), in which this Court found that the credit of a federal contractor was involved when the contractor was obligated to pay for the material despite the fact that the government reserved the right "to pay directly ... all sums due from the Contractor." Olin had the obligation to pay for the electricity and the federal government stood only as an inchoate guarantor of Olin's obligation. That the federal government might ultimately be liable on a sale, if Olin failed to perform, does not dictate a finding of sovereign tax immunity for those transactions when Olin did perform. *U.S. v. New Mexico*, 445 U.S. 720, 743 (1982). The decision of the Eighth Circuit establishing that the federal government can be declared the purchaser entitled to sovereign tax immunity any time it might have to pay for the commodity (and the embrace of that conclusion by the federal government), demonstrates the dramatic impact of what on its face may appear a narrow, technical decision.

4. The government relies largely on labels. It claims that it is the purchaser of the electricity because the 1951 Contract for electrical services says that KCPL agreed to sell and deliver electricity to the government and the government agreed to purchase and receive the electricity. Brief in Opp., pp. 2 & 11. This Court rejected such labeling arguments in its last significant sovereign immunity case, noting that constitutional immunities cannot rest on an approach that allows government functionaries "to draw the constitutional line by changing a few words in a contract." *U.S. v. New Mexico*, 445 U.S. 720, 737 (1982) (quoting *Kern-Limmerick, Inc. v. Scurlock*, 347 U.S. 110, 126 (1954)

(dissenting opinion)). The government's argument against granting certiorari proves that *New Mexico's* acceptance of the dissent's view in *Kern-Limmerick* was not enough.

Attempting to demonstrate continuing conformity with the Contract's "sell and deliver" language, the federal government asserts that the power is delivered to federally owned substations. Brief in Opp. pp. 3 & 12. Electricity is not delivered to substations, it passes through them. Electricity is based on the flow of current and the presence of voltage. JA, Vol. I, 104. If the switch completing a circuit is open there is no energy in the line because there is no current; rather electricity instantly flows from the point of generation to the load when the switch is closed. JA, Vol. I, pp. 104-06. Olin is the party that controls both the switches closing the circuits and the equipment that consumes the electricity. JA, Vol. I, 253. Electricity is not delivered to the government's substations where it awaits use; it is delivered through them and used instantly. JA, Vol. I, 104-06.

Still seeking to rely on its original Contract and ignore its amendment and the practices of its contractors, the federal government invokes the appellate court's declaration that the federal government has a contractual relationship with the seller. This could be relevant if Missouri were attempting to tax that contractual relationship. But it is not. Missouri taxes one category of sales, those made at retail. This means sales transferring title or ownership (defined as the exercise of dominion or control) to a purchaser for use or consumption, not for resale, for a valuable consideration. Here Olin received control of the electricity directly from KCPL and Olin paid KCPL for it. No existing principle of constitutional immunity prohibits Missouri's taxation of this transaction.

5. The reasons for granting Missouri's petition for writ of certiorari are weighty. This Court has never sanctioned the federal government's interference with a state's power to place the legal incidence of its sales tax where it chooses. The Eighth Circuit's opinion does just that by refusing to recognize or even discuss those provisions of Missouri law that make the transfer of the sales tax from the seller to the purchaser an option accorded the seller. Furthermore, this Court has never held that sovereign tax immunity strips a state's power to tax the activities of a federal contractor that orders, uses and pays for a commodity with its own funds. In fact, this Court has previously held that if the federal government wants more protection for its contractors from state taxation it must rely on the legislative process, not the Constitution. *New Mexico*, 455 U.S. at 737 and 744. The Eighth Circuit has authorized the federal government to ignore that direction by this Court and, simultaneously, interfered with Missouri's retained sovereign power to tax federal contractors.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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(1) The sales tax collected by a seller from the purchaser may be deducted from the seller's gross receipts if those amounts are separately stated to the purchaser and added to the purchase price.

(2) Example 1: Mr. Wool is in the business of selling boxes of hard candy. Boxes are sold for various prices to which the sales taxes are added. Mr. Wool collects the price and tax from each customer. At the end of January, Mr. Wool has recorded total receipts of ten thousand three hundred dollars ($10,300) (composed of the ten thousand dollar ($10,000) sales price and the three hundred dollar ($300) state sales tax). In preparing his sales tax return for the month of January, Mr. Wool should report his taxable gross receipts of ten thousand dollars ($10,000) and compute the tax.

(3) Example 2: Mr. Chrunch is in the business of selling boxes of peanuts. Boxes are sold for various prices to which no state sales tax is added and separately stated. Mr. Chrunch collects the amounts from each customer and records the total amount as a sale on his books. At the end of January, Mr. Chrunch has recorded total sales of twenty thousand dollars ($20,000). In preparing his sales tax return for the month of January, Mr. Chrunch should report gross receipts of twenty thousand dollars ($20,000) and compute the tax. Mr. Chrunch may not reduce his gross receipts (by claiming a deduction or otherwise) for state sales tax deemed to be included since the tax has not been added to and separately stated from the sales price of the peanuts.

(4) Example 3: Mr. Glass operates a tavern. Bottles of beer are sold for seventy five cents (75¢) each and mixed drinks are one dollar and twenty-five cents ($1.25) each and

no mention of sales tax is made to customers. Mr. Glass records the total amount received thirty thousand dollars ($30,000) as a sale on his books. At the end of January, Mr. Glass should report gross receipts of thirty thousand dollars ($30,000) and compute the tax. Mr. Glass may not reduce his gross receipts (by claiming a deduction or otherwise) for state sales tax deemed to be included since the tax has not been added to and separately stated from the sales price of the drinks.